



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 302 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 16th July, 2020)

SARAH ADHIAMBO AWIYO.....1ST CLAIMANT

CAROLINE WANGARI THUU.....2ND CLAIMANT

VERSUS

G4S KENYA LIMITED.....RESPONDENT

CONSOLIDATED WITH CAUSE 153A OF 2017

MARTIN MWANGI MURIUKI.....CLAIMANT

VERSUS

G4S KENYA LIMITED.....RESPONDENT

RULING

1. The Applicant filed a Notice of Motion on 15/3/2020 seeking the following orders:-

1. Spent.

2. Pending the hearing and determination of this application, there be a stay of execution of the Judgment of Honourable Lady Justice Hellen Wasilwa dated 24/2/2020 and delivered on 25/2/2020.

3. Pending the hearing and determination of the intended appeal, there be a stay of execution of the judgment of Honourable Lady Justice Hellen Wasilwa dated 24/2/2020 and delivered on 25/2/2020.

4. The costs of this application be provided for.

2. The application is based on grounds that:

1. On 25/2/2020 the Court entered Judgment in favour of the Respondent/Claimant against the Applicant/Respondent for a total sum of Kshs. 11,113,710.00 together with costs.

2. The Applicant is aggrieved by the Judgment of this Court and intends to appeal to the Court of Appeal. It has good grounds of appeal with reasonable prospects of success as shown in the annexed draft Memorandum of Appeal.

3. The sum of Kshs. 11,113,710.00 is substantial and should the Respondents proceed with the execution, the Applicant is not likely to recover the said sums from the Respondents whose means and assets are unknown.

4. The temporary stay of execution lapsed on 25/3/2020 and the Applicant is apprehensive that if an order for stay is not granted, the Respondent will proceed to execute the decree against the Respondent to the Applicant's detriment.

5. The Applicant will suffer substantial and irrecoverable loss and the intended appeal will be rendered nugatory unless an order for stay of execution is granted.

3. The application is supported by the affidavit of Elijah Sitimah, the Applicant's Human Resource Director sworn on 18/3/2020 in which he reiterates the grounds set out in the application.

4. In response to the application, the 1st Respondent filed a Replying Affidavit, on behalf of the other Respondents, sworn on 10/6/2020. She depones that the Applicant was granted stay of execution on 25/2/2020 for 30 days pending the filing of an appeal but the same was not filed. She avers that the Court was never informed that a similar application and prayers were sought on 25/2/2020 in a different forum on the same facts.

5. She avers that the decree and certificate of costs have not been applied for and are yet to be issued, therefore there is no imminent danger if execution. She avers that the mere filing of an appeal does not *ipso facto* connote stay of execution order should issue and as such issuance will be unfettered.

6. She contends that the Applicant has not placed before the Court enough material to prove that the Respondents would not refund the decretal sum if the appeal succeeds. She avers that the application does not meet the threshold for conditions for grant of an order of stay of execution pending appeal set out under Order 42 Rule 6 of the Civil Procedure Rules.

7. She avers that should this Court grant the order for stay, they seek to be paid part of the decretal sum to enable them enjoy the fruits of the judgment.

8. The matter proceeded by way of written submissions with each party filing its respective submissions.

Applicant's submissions

9. The Applicant submitted that it filed the application without delay and before the lapsing of the temporary stay of Judgment on 25/3/2020. It submitted that the sum of Kshs. 11, 113,710 is quite substantial and should the Respondents proceed with execution, it is not likely to recover the amount. It submitted that the 1st Respondent has not demonstrated whether she or the other Respondents are in a position to refund the sum to it should the appeal succeed.

10. It relied on the case of **Kenya Orient Insurance Co. Ltd v Paul Mathenge Gichuki & another [2014] eKLR** where the Court relied on the Court of Appeal decision in **ABN Amro Bank N.V v Le Monde Foods Limited Civil Application No NAI 15 of 2002** that the burden of proof at that the Respondent can refund the decretal sum if the appeal succeeds shifts to the Respondent the moment the appellant is unaware of the Respondent's resources.

11. It submitted that its appeal will be rendered nugatory unless the order for stay is granted. It relied on the case of **Muriel Ogoudjobi v Mara Ison Technologies Kenya Limited [2016] eKLR** where the Court granted an order for stay to preserve the substratum of the appeal.

12. It submitted that it is willing to offer security for the due performance of the decree by offering a bank guarantee or any form of security as the Court may direct. It argued that the Respondents' submission that it has no arguable appeal is not correct because whether an appeal is arguable or not is not the consideration of this Court when determining an application under Order 42 Rule 6 of the Civil Procedure Rules and they have not singled out the ground (s) that are nor arguable.

13. In conclusion, it submitted that it has established grounds for stay of execution and that prayed that the Court allows the application.

Respondents' submissions

14. The Respondents submitted that the cornerstone of the jurisdiction of this Honourable Court to grant stay under Order 42 Rule 6 of the Civil Procedure Rules is that an Applicant ought to demonstrate that substantial loss would result to it unless stay is granted. They submitted that the Applicant has not demonstrated how it would suffer substantial loss if the order for stay is not granted.

15. They submitted that the only known way of showing substantial loss is by an applicant demonstrating that if the decretal sum is paid out the decree holder would not be in a position to be refunded as he is totally a person of no means. In support of this position, they relied on the case of **Peter Mutuku Nthuku v Perimeter Protection Limited [2019] eKLR**.

16. They submitted that it is a principal in law that appeals in money decrees are never rendered nugatory for one to sue for recovery. They argued that the application does meet the threshold for grant of stay pending appeal and that they should be allowed to enjoy the fruits of the Judgment. They urged the Court to dismiss the application with costs.

17. I have considered the averments of the Parties herein.

18. Guided by Order 42 rule (6)(2) of the Civil Procedure Act, I note that the Respondent aver that they have preferred an appeal in this case. They also aver that they are ready to offer a security before Court in form of a bank guarantee.

19. In the circumstances, my finding is that the Respondent have established reasons to warrant a stay so that the Appeal if it succeeds will not be rendered as academic exercise.

20. I therefore allow the stay on grounds that the decretal sum is deposited in an interest earning account held in the joint names of Counsels on record within 60 days. In default execution to issue.

Dated and delivered in Chambers via zoom this 16th day of July, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Onyancha for Claimant – Present

Miss Obiero holding brief Makori for Respondent – Present